UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14TH STREET NW
WASHINGTON DC 20570

May 7, 2012

Re: NLRB V. U.S. Postal Service, 660 F.3d 65 (1st Cir., decided October 27, 2011), denying enforcement of and remanding U. S. Postal Service, 356 NLRB No. 75 (2011)
Board Case 24-CA-10805

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Dear Counsels:

This is to advise you that the Board has decided to accept the remand from the Court of Appeals in the above proceeding and that all parties, if they so desire, may file statements of position with respect to the issues raised by the remand.

Statements of position must conform to Section 102.46(j) of the Board's Rules and Regulations, and must be received by the Board in Washington, D.C. **on or before May 30, 2012**. Thereafter, the Board will take whatever action is consistent with the Court's remand.

Very truly yours,

Henry S. Breiteneicher

Henry S. Breiteneicher
Associate Executive Secretary

cc: Parties

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of the General Counsel

MEMORANDUM

TO: The Board DATE: December 22, 2011

FROM: Lafe E. Solomon, Acting General Counsel
John H. Ferguson, Associate General Counsel
Linda Dreeben, Deputy Associate General Counsel
David Habenstreit, Assistant General Counsel
Usha Dheenan, Supervisory Attorney
Nicole Lancia, Attorney

SUBJECT: Recommendation respecting certiorari in *NLRB v. U.S. Postal Service*, No. 11-1225 (1st Cir., decided October 27, 2011), 660 F.3d 65, denying enforcement of and remanding 356 NLRB No. 75
Board Case No. 24-CA-10805
Recommendation Due Justice: January 10, 2012

The Board's order requires the United States Postal Service to provide the Union with its hiring register, which included applicants' test scores, to enable the Union to evaluate claims of discrimination against veterans. The First Circuit denied enforcement because it disagreed with the Board's conclusion that applicants had no expectation that their test scores could not be disclosed to the Union, and remanded the case to the Board with instructions to balance the employees' confidentiality interest against the Union's need for information under *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). For the reasons set forth below, I recommend that the Board not seek certiorari, but instead accept the Court's remand.

I. The Board's Decision

1. National Postal Mailhandlers' Union, Local 313 ("the Union") represents mail handlers in Puerto Rico and the Virgin Islands. The current collective-bargaining agreement ("CBA") provides that seniority is computed based on an employee's enter-on-duty date.

Test 473 is the standard entrance exam given to all applicants for mail handler positions; it measures aptitude, skills, and abilities, as well as relevant personal characteristics and experiences. An applicant's "final rating" for hiring is the sum of the applicant's basic Test 473 score and any veterans' preference points. Applicants with a passing score on the test are placed on the mail handler hiring register in order of their final rating, from highest to lowest, and are hired in that order. The hiring register contains the applicant's name, date of birth, standing on the register, exam date, veterans' points, basic score, and final rating. Once hired, employees receive an enter-on-duty date, and are removed from the register.

An information package provided to applicants contains a "Privacy Act Statement," setting forth applicants' rights under the Privacy Act, 5 U.S.C. §522a(b), which limits the conditions in which the federal government, including the Postal Service, may disclose information in its records pertaining to an individual without that individual's consent.[1] Consistent with USPS regulations, the information package advised that personal information may be disclosed, pursuant to a "routine use" exception, "as required by the National Labor Relations Act." The "473 Answer Sheet" similarly informs applicants that any information provided may be disclosed to "labor organizations as required by law." USPS's separate "Guide to Privacy and Freedom of Information Act," available to the public and employees, states that recruiting, examination, and placement records may, as a "Standard Routine Use," be disclosed to labor organizations when needed to perform their collective-bargaining obligations.

Some veterans among the 22 employees hired in 2007 complained to Union President Julio Figueroa that nonveterans with lower final ratings and later application dates were hired before them and consequently possessed higher seniority. On multiple occasions beginning July 2, 2007, Figueroa requested that USPS provide the hiring register listing all eligible candidates, including the recently-hired veteran and non-veteran employees and their positions on the roster. He explained that he needed the information to determine whether USPS had discriminated against veterans in setting their starting dates and, thus, determining their seniority. After several months of discussion, USPS's legal representative, Leslie Rowe, insisted that Figueroa obtain applicants' consent for release of their information. Alternatively, she offered to provide the register in redacted form to protect applicants' privacy. Rowe then sent him one redacted page of the hiring

[1] The Privacy Act applies to the USPS. 39 U.S.C. §410(b).

register, but Figueroa explained that he could not tell from that document whether the final ratings were correct because the scores and final ratings were redacted.

Finally, on January 30, 2008, Figueroa requested the "Caribbean District Hiring Register including the scores of all the candidates (veteran and non-veteran) for the year of 2007. The information shall include the name, the scores, whether or not they are veterans, the final scores for each candidate and their eligibility in the register." USPS did not provide it.

2. The General Counsel issued a complaint alleging that USPS unlawfully refused to furnish the information requested on January 30. 356 NLRB No. 75, slip op. at 2. As part of its defense, USPS contended that applicants' interests in the confidentiality of their test scores precluded the Board from compelling disclosure of that information. In so contending, USPS relied on *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), in which the Supreme Court relied on confidentiality concerns to rule that the employer was not required to disclose to the union employees' psychological aptitude test scores without the employees' consent, even assuming the information was potentially relevant to the union's grievance.[2]

3. The administrative law judge concluded that USPS violated Section 8(a)(5) and (1). He found that the information regarding unsuccessful applicants was not relevant, but that the requested information on the 22 unit members was relevant to investigating veterans' complaints about unfairly low seniority. 356 NLRB No. 75, slip op. at 10-11.[3] In finding that USPS acted unlawfully by failing to provide the requested information with respect to the 22 employees, the judge rejected USPS's *Detroit Edison*-based confidentiality defense. *Id.* at 10-11.

4. The Board (Chairman Liebman and Members Pearce and Hayes) affirmed the judge's finding of a violation. *Id.* at 1-5. In so doing, the Board

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[2] In reaching that conclusion, the Supreme Court weighed the Union's need for the information against the employees' interest in the privacy of their test scores. The Court based its evaluation of those competing interests on three factors: (1) the interest of the employees in confidentiality, (2) the burden placed on the union to obtain consent, and (3) whether the employer was using employee privacy as a pretext to avoid its duty to bargain. 440 U.S. at 317-20.

[3] The Court's decision incorrectly suggests that the judge found that the Union was entitled to information regarding applicants other than the 22 who were hired, 660 F.3d at 68, but that error was immaterial to the Court's disposition of the case.

found that USPS failed to establish the existence of a legitimate and substantial confidentiality interest under *Detroit Edison*. *Id.* at 4-5. The Board found that "regardless of any . . . sensitivity" that applicants might have to the disclosure of their test results, the applicants here had no legitimate expectation that those results would remain confidential, given USPS's various disclosures, made pursuant to the Privacy Act, advising them that such information could be disclosed as required by law. *Id.* at 4. The Board thus distinguished *Detroit Edison* as a case in which the employer had expressly promised applicants that their test scores would remain confidential. *Id.* at 5 (discussing 440 U.S. at 306, 317). The Board concluded that applicants who continued the application process "had no legitimate confidentiality interest in test results they knew were subject to disclosure to labor organizations" and, accordingly, ordered USPS to produce the requested information with respect to applicants who were hired. Slip op. at 5.

II. The Court's Decision

The Court of Appeals (Chief Judge Lynch, joined by Judges Boudin and Stahl) denied enforcement and remanded. Finding the ultimate issue to be the proper interpretation of the Supreme Court's opinion in *Detroit Edison*, the Court engaged in de novo review. 660 F.3d at 68. It held that USPS employees had a sufficient confidentiality interest to require the Board to engage in a "balancing of interests" analysis under *Detroit Edison* in determining whether to compel USPS to provide the Union with the test scores, and to decide whether employees' consent to disclosure was required. 660 F.3d at 66, 72.

The Court described the case as involving a "clash" between the Act, which imposes on USPS the duty to furnish relevant information to a union for purposes of collective bargaining, and the Privacy Act, which obligates USPS to protect the privacy of its employees' personal information unless they consent to disclosure. *Id.* at 65-66. It determined that the Board's finding of an unfair labor practice "rest[ed] on its reasoning that no privacy interests are at stake in this case and so no balancing of interests was required as between the Union's interest in the information and the employees' interest in privacy." *Id.* at 66. Contrary to the Board, the Court determined that employees had a legitimate privacy interest in their test scores. *Ibid.*

The Court explained that in *Detroit Edison*, "[f]irst and foremost, the [Supreme] Court took judicial notice of '[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence' and found the employees' interest in confidentiality 'undeniabl[e].'" *Id.* at 69-70

(quoting 440 U.S. at 304, 318) (citations omitted). The Court rejected the Board's distinction of *Detroit Edison*, finding insignificant the difference between that employer's express promise that test scores would remain confidential and USPS's Privacy Act statements advising applicants that their information could be disclosed. *Id.* at 70-71. It stated that the USPS notices "first reaffirmed to applicants that their information would be kept private and then alerted them to possible, limited disclosures [but] did not wipe out all expectations of privacy." *Id.* at 71.

In this regard, the Court explained that the Privacy Act's "routine use" exception, pursuant to which relevant information subject to the Privacy Act may be disclosed to a collective bargaining representative when required by the NLRA, *id.* at 67-68, "does not *mandate* unconditional disclosure where there is a strong competing interest in privacy." *Id.* at 71 (emphasis in original). The Court concluded that the disclosure of information "'as required by law' does not itself defeat all expectations of privacy, nor does it create an expectation that the information will be disclosed automatically whenever it is relevant to the union." *Id.* at 72. The Court accordingly held that the Board incorrectly found the employees had no legitimate expectation of confidentiality; to the contrary, the Court found, the employees' confidentiality interest here was "as great as the interest of Detroit Edison's employees." *Ibid.* Consequently the Board erred in declining to "weigh[] the interests of the Union in the information against the privacy interests of the employees," as in *Detroit Edison*. *Ibid.* Having so found, the Court remanded to the Board for "further proceedings consistent with [its] opinion." *Ibid.*

III. Recommendation

In rejecting the Board's finding that employees had no privacy interest in their test scores, the Court disagreed with the Board as to the effect of USPS's Privacy Act disclosures on employees' expectations of privacy. The Court, observing that the notices "functioned to reiterate USPS's obligations under federal law to keep confidential its employees' personal information," concluded, contrary to the Board, that advising employees "that information may be disclosed 'as required by law' does not defeat all expectations of privacy. . . ." While the disagreement between the Court and the Board appears to implicate the interaction of the NLRA and the Privacy Act, Supreme Court review of the Court's decision is not warranted.

First, the effect of Privacy Act notices on whether test scores are confidential for purposes of disclosure under the NLRA is not an issue of broad concern under the Act, as it arises only in cases involving USPS, the only employer subject to the Privacy Act over which the Board has jurisdiction. Second, the issue is not currently ripe for further review. This is the first court of appeals decision to address the application of *Detroit Edison* to disclosure of Postal Service applicant test scores where the Postal Service has issued Privacy Act notices informing applicants that information may be disclosed "as required by the National Labor Relations Act."[4] Moreover, in its decision, the Board did not specifically address what the Court described as the "clash" between the NLRA and the Privacy Act. Before seeking Supreme Court review, the issue would need further analysis by the Board and percolation in the courts of appeals.

Having rejected the Board's determination that there was no confidentiality interest in the test scores, the Court properly remanded the case for the Board in the first instance to weigh the Union's interest in relevant information against employees' privacy interests under *Detroit Edison.* The Court's remand, moreover, does not preclude the Board, consistent with the Court's opinion and *Detroit Edison,* from striking the balance to require disclosure of the information.

For all the foregoing reasons, I recommend that the Board not seek certiorari but instead accept the Court's remand.

L.S.

[4] The Court cited two other *Postal Service* cases for the principle that, even if relevant, psychological test results need not necessarily be disclosed. 660 F.3d at 71-72. Neither of those cases, however, involved test scores or expectations of privacy based on Privacy Act disclosures. Moreover, in both cases, the courts required disclosure of the requested information, rejecting the Postal Services' argument in those cases that disclosure violated the Privacy Act. *See NLRB v. U.S. Postal Serv.*, 17 F.3d 1434, 1994 WL 47743 at *3-4 (4th Cir. 1994) (unpublished) (requiring disclosure of attendance records); *NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1572-73 (11th Cir. 1989) (requiring disclosure of records showing disciplinary actions taken against supervisors).

J-6176

United States Court of Appeals
For the First Circuit

DHEENAN/LANCIA
24-CA-10805
356 NLRB No. 75

No. 11-1225

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

Before

Lynch, Chief Judge
Boudin and Stahl, Circuit Judges.

Nicole Lancia, Attorney, with whom Usha Dheenan, Supervisory Attorney, National Labor Relations Board, was on brief for petitioner.

Stephan J. Boardman, Counsel of Record, with whom David C. Belt, Acting Chief Counsel, and Peter J. Henry, Senior Counsel, U.S. Postal Service, were on brief for respondent.

October 27, 2011

LYNCH, Chief Judge. This case involves a clash between two federal entities and two different important values. The National Labor Relations Act (NLRA) § 8(a)(5), 29 U.S.C. § 158(a)(5), imposes on the United States Postal Service (USPS) the duty to bargain collectively, which includes the obligation to furnish relevant information to a labor union for purposes of collective bargaining. NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967). The Privacy Act, 5 U.S.C. § 552a(b), meanwhile, imposes on USPS the obligation to protect the privacy of its employees' personal information unless they consent to disclosure.

The National Labor Relations Board found that USPS committed an unfair labor practice under section 8(a)(1) and (a)(5) by refusing to provide the National Postal Mailhandlers Union, Local 313, with the personal aptitude test scores of twenty-two USPS employees unless the Union first obtained their consent. Both sides agree that the test scores are relevant to the Union for collective bargaining purposes and could be disclosed with appropriate employee consent.

The Board's unfair labor practice finding, on which it seeks enforcement, rests on its reasoning that no privacy interests are at stake in this case and so no balancing of interests was required as between the Union's interest in the information and the employees' interest in privacy. USPS argues that its employees

have a substantial privacy interest in their test scores, recognized under federal law.

We vacate and remand the Board's decision, and hold that the twenty-two USPS employees have a legitimate and substantial privacy interest in their test scores and that the Board, accordingly, is required to engage in the balancing of interests omitted from its original analysis.

I.

USPS requires all applicants for its mail handler position to take psychological aptitude test, "Test 473." This test has been developed by USPS's own industrial psychologists and has proven an effective way of measuring USPS applicants' job performance potential in certain job practice areas. Test 473 is designed to measure the test taker's cognitive skills and general mental ability, as well as his or her personal characteristics, as they relate to "conscientiousness, interpersonal skills, professional service orientation, self-management, and dealing with work pressures and demands."[1]

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[1] The test is divided into four parts. The first three parts measure the test taker's cognitive skills, while the fourth part measures personal characteristics. The substantive contents of these parts are as follows: Part A consists of address checking exercises, requiring the examinee to compare two lists of addresses and identify discrepancies between the lists. Part B requires examinees to complete a form by assigning information to its proper location within the form. Part C consists of a coding exercise in two subparts, whereby examinees must assign the proper code to various addresses, first with a coding guide on hand for reference, and subsequently without that guide. Finally, Part D consists of

Passing scores on Test 473 range from 70 to 100 points. Once the test is scored, an applicant who is eligible for them may receive an additional five to ten points as a veteran's preference. The combined test score and veteran's preference (if any) are added to reach the applicant's "final rating." After calculating each applicant's final rating, USPS places each applicant's name, date of birth, standing, exam date, applicable veteran's points, basic Test 473 score, and final combined rating onto the official USPS hiring Register for the year in question.

In 2007, USPS announced job openings for mail handler positions in the Caribbean District, including several openings in the San Juan Office in Puerto Rico. Some 9,000 applicants subsequently took Test 473; 8,000 of these passed and were placed on USPS's 2007 hiring Register. Under standard USPS procedure, human resources considered the three top-rated applicants for each job opening in the District. The San Juan Post Office hired twenty-two new employees from these applicants.

The National Postal Mailhandlers Union, Local 313, represents Postal Service workers and is the exclusive bargaining agent for mail handlers in the Caribbean District. Under USPS regulations, and the current collective-bargaining agreement

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236 questions designed to assess a test taker's personal characteristics and experiences. Example questions include: "You plan things carefully in advance: a) very often; b) often; c) sometimes; d) rarely," and "What type of work do you like the least?"

between USPS and Local 313, USPS must compute its new employees' seniority rankings under "properly established past principles, rules and instructions." After successfully completing a 90-day trial period, new employees are assigned a seniority rank, which corresponds to their first day of work.

Sometime after the San Juan Office assigned seniority rankings to its group of twenty-two new employees, several members of this group who were veterans approached the President of Local 313 with an unfair employment complaint. They raised their concern that within the group of new employees, non-veteran employees had begun work earlier -- and thus received higher seniority rankings -- than veteran employees, despite the fact that the veteran employees had applied for their positions earlier than had the non-veteran employees. In response to this complaint, the President of Local 313 requested from USPS the 2007 hiring Register, as well as the Register information for the group of twenty-two new employees.[2]

Because the USPS hiring Register identifies applicants' test scores as well as other personal information, its contents are kept strictly confidential by USPS pursuant to the federal Privacy Act. See 39 C.F.R. § 268.1. Under the Privacy Act, any

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[2] USPS removes applicants from the hiring Register once they have been hired as employees, but the original 2007 Register included the information of all applicants, including the twenty-two ultimately hired by the San Juan Office.

information contained within a federal agency's "system of records"[3] may not be disclosed by any means of communication, to any person or entity except upon "prior written consent of[] the individual to whom the record pertains", or unless the disclosure falls within one of several enumerated exceptions. 5 U.S.C. § 552a(b). Of these, the Privacy Act's "routine use" exception permits disclosure of a record for a purpose "compatible with the purpose for which it was collected."[4] 5 U.S.C. § 552a(b)(3), (a)(7).

This catch-all exception is limited, however, by the requirement that agencies define specific routine uses and publish these, subject to notice and comment, in the Federal Register in advance of invoking them. 5 U.S.C. § 552a(e)(4).

USPS has published a list of eleven routine uses, under which USPS employee records may be disclosed. Privacy Act of 1974, System of Records, 70 Fed. Reg. 22,516, 22,521 (Apr. 29, 2005). Included in this list is a qualified exception for disclosure to labor organizations, "[a]s required by applicable law . . . when

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[3] The Privacy Act defines "record" to mean any instance of, grouping or collection of information about an individual containing that individual's name, identifying number, symbol, or any other identifiable particular assigned to the individual that is maintained by a federal agency. 5 U.S.C. § 552a(a)(4).

[4] It is far from clear that the purpose for which these test scores were collected is inherently "compatible" with disclosure in this instance. But the parties have not argued this point and instead have focused on the USPS published list of routine uses.

needed by that organization to perform its duties as the collective bargaining representative of [the USPS] employees in an appropriate bargaining unit." Id.

Under these regulations, and due to its concerns about the privacy of its applicants and employees, USPS elected not to provide Local 313 with the requested information. USPS offered to release the information contained in the 2007 Register with respect to any individual from whom Local 313 obtained consent.

Local 313 rejected this offer, as well as USPS's offer to supply a redacted version of the Register, and filed an unfair labor practice charge under section 8(a)(1) and (a)(5) of the NLRA. The Administrative Law Judge found in favor of Local 313, and ordered USPS to furnish the Union with the complete 2007 hiring Register. U.S. Postal Serv., Case 24-CA-10805, 2008 WL 3286174 (ALJ Aug. 5, 2008).

The National Labor Relations Board affirmed the judgment and a portion of the Administrative Law Judge's Order, on different grounds, but narrowed the Order, directing USPS to furnish the Union with the Register information for only the twenty-two applicants USPS actually hired. U.S. Postal Serv., 356 N.L.R.B. No. 75, 2011 WL 39985 (Jan. 5, 2011).

USPS argued before the Administrative Law Judge and the Board that federal law permitted it to condition disclosure of employee test scores on employee consent. It argued that the

Privacy Act's routine use exception allows disclosure pursuant to the NLRA only where required by law. Because the Supreme Court held in Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979), that the NLRA does not require unconditional disclosure of psychological aptitude test scores, USPS argued that it was not obligated to release employee test scores unconditionally under the routine use exception.

The Board rejected this argument on the grounds that the underlying confidentiality interest raised by USPS failed. The Board distinguished Detroit Edison on the grounds that the employer in that case had made an express promise of confidentiality to its employees. It reasoned that USPS, quite the opposite from promising employees that it would keep their test scores confidential, provided employees with several Privacy Act notices warning them that their scores could be released to a labor union when needed by the union for collective bargaining. U.S. Postal Serv., 2011 WL 39985, at *7. The employees, the Board found, thus had "had no legitimate expectation that their test results would remain confidential." Id.

The Board reasoned that employees must receive an explicit promise of confidentiality in their scores from their employer to acquire an expectation of privacy. Id. As a result, the Board did not engage in any further balancing of the interests

or address whether consent was a reasonable condition of disclosure. Id.

II.

Because the ultimate issue is one of proper interpretation of a Supreme Court opinion, our review is de novo. With regard to the Board's interpretation of Detroit Edison, a court of appeals is "not obligated to defer to an agency's interpretation of Supreme Court precedent under Chevron or any other principle." N.Y., N.Y., LLC v. NLRB, 313 F.3d 585, 590 (D.C. Cir. 2002) (quoting Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1341 (D.C. Cir. 2002)) (internal quotation mark omitted); see also Providence Hosp. v. NLRB, 93 F.3d 1012, 1016 (1st Cir. 1996) ("As to matters of law, appellate review is plenary.").

USPS does not dispute that an employer's duty to bargain collectively under section 8(a)(5) of the NLRA unquestionably includes "a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." Detroit Edison Co., 440 U.S. at 303; see also Acme Indus. Co., 385 U.S. at 435-36.

Where, as here, the relevance of the requested information is not in question, an employer, nevertheless, is not automatically obliged to disclose "all the information in the manner requested." Detroit Edison, 440 U.S. at 314. Rather, an employer's duty to disclose information under section 8(a)(5), as

well as "the type of disclosure" necessary to satisfy this duty, id. at 315, turns on "the circumstances of the particular case," id. at 314 (quoting NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956)). In evaluating these circumstances, there is no "absolute rule" that a union's need for relevant information must always trump all other interests. Id. at 318.

The Supreme Court has held that a union's interest in relevant information must accommodate other, competing interests, such as privacy. Id. This court held in NLRB v. New Eng. Newspapers, Inc., 856 F.2d 409 (1st Cir. 1988), that "a balancing is required" as between "the need to know by the union to allow it to effectively carry out its functions as bargaining representative of the employees," and an "employer's legitimate right to privacy, in which the relevancy of the information sought and the safeguards provided to the employer to protect its privacy interest are the principal elements to be considered." Id. at 413.

In Detroit Edison, the Supreme Court held, on the facts there, that the confidentiality interest employees have in their aptitude test scores warrants an employer's refusal to release these scores to a union unless the union first obtains employee consent.

The employer in Detroit Edison had administered a "psychological aptitude test[]", which measured test takers' cognitive skills. 440 U.S. at 304. In order to address a

grievance related to unfair promotions based on this aptitude test, the local union had requested the test questions, the actual answer sheets, and the final test scores of all employees who had applied for a particular promotion. The employer refused to disclose the test scores and answer sheets absent employee consent in order to protect the privacy of its employees. Id. at 317.

The Supreme Court assumed the relevance of the scores to the union's investigation and processing of the grievance, but nevertheless held that the company's offer to disclose the test scores upon the written consent of its employees "satisfied [the company's] statutory obligations" under the NLRA. Id. at 317.

The Court based its evaluation of the competing interests at stake in the case on three different factors: the interest of the employees in confidentiality, the burden placed upon the union by conditional disclosure, and whether there was evidence that the company was using employee privacy as a pretext to avoid its statutory obligations to bargain collectively. Id. at 319-20.

First and foremost, the Court took judicial notice of "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence," id. at 318, and found the employees' interest in confidentiality "undeniabl[e]," id. at 304. It noted that an individual's "interest in preserving the confidentiality" of sensitive, personal information "has been given forceful recognition in both federal

and state legislation," and cited the federal Privacy Act as one manifestation of this concern. Id. at 318 n.16 (citing Privacy Act of 1974, 5 U.S.C. § 552a).

The Court noted that multiple other courts had recognized that important privacy interests may limit unconditional disclosure of sensitive personal information to unions even where the information is relevant to collective bargaining. See id. at 318 n.14 (collecting cases); id. at 318 n.16 (citing Local 2047, Am. Fed'n of Gov't Emps. v. Def. Gen. Supply Ctr., 423 F. Supp. 481 (E.D. Va. 1976), aff'd, 573 F.2d 184 (4th Cir. 1978) (per curiam) (holding that the Privacy Act constituted a valid defense to unconsented-to disclosure of employee records to a union requesting those records pursuant to the terms of a collective-bargaining agreement)).

The Court also found that the employer's condition that the union obtain employee consent before disclosure placed a "minimal burden" upon the union, and noted that the employer's asserted interest in confidentiality on behalf of its employees was real and not merely an attempt to frustrate the union or avoid its legal obligation to bargain collectively. Id. at 319.

After evaluating these factors under the "circumstances of the particular case," the Court held that "any possible impairment of function of the Union . . . is more than justified by the interests served in conditioning the disclosure of the test

scores upon [consent]," id., and that the employer did not violate its statutory obligations under the NLRA by "resisting an unconsented-to disclosure," id. at 320.

III.

In the present dispute, the Board attempted to distinguish Detroit Edison on its facts. The Board found Detroit Edison inapplicable because the employer in that case had expressly promised employees that it would maintain the confidentiality of their test scores.[5] The Board concluded that USPS employees, far from anticipating that their scores would be kept confidential, should have expected their scores would or could be disclosed and therefore had "no legitimate confidentiality interest" in their scores. U.S. Postal Serv., 2011 WL 39985, at *7.

The Board based this conclusion on USPS's publicly available Guide to Privacy and the Freedom of Information Act, which details USPS's obligations under that Act, as well as two Privacy Act notices contained in the materials distributed by USPS to applicants for employment: the 2007 USPS mail handler position application packet and the answer form to Test 473. Both of these notices informed applicants that the Privacy Act applied to any

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[5] The Board has recognized in its decisions that unions may be required to accommodate employers' restrictions on disclosure of certain categories of information, which, if disclosed, "would reveal, contrary to promises or reasonable expectations, highly person information." U.S. Postal Serv., 356 N.L.R.B. 75, 2011 WL 39985, at *6 (Jan. 5 2011) (citing Detroit Newspaper Agency, 317 N.L.R.B. 1071, 1073 (1995)).

personal information they chose to divulge, and elaborated that this personal information would be kept confidential, but could be disclosed "as required by law."

The two notices also referenced USPS's routine use exception to the Privacy Act for disclosure to labor organizations. The application packet's privacy notice stated, "As a routine use, we may only disclose this information as follows: . . . as required by the National Labor Relations Act." A similar notice was repeated on the answer sheet for Test 473: "We may only disclose your information as follows: . . . to labor organizations as required by law." Finally, as the Board noted, USPS's publicly available Guide to Privacy reiterates USPS's obligations under the Privacy Act and reproduces USPS's eleven Standard Routine Uses in full.

The Board concluded that as a result of these notices, any applicant who proceeded to "complete the exam thus had no legitimate confidentiality interest in test results they knew were subject to disclosure to labor organizations." U.S. Postal Serv., 2011 WL 39985, at *7.

With no privacy interest at stake in the case, the Board found Detroit Edison inapplicable and declined to engage in the balancing analysis conducted by the Court in that case. Instead, the Union's interest in the information automatically prevailed.

We hold that the Board erred in its conclusion that USPS employees retained no privacy interests in their aptitude test scores. The Privacy Act notices first reaffirmed to applicants that their information would be kept private, and then alerted them to possible, limited disclosures. The notices did not wipe out all expectations of privacy.

Employees were informed by the notices in the application packet and answer sheet to Test 473 that disclosure could occur under restricted circumstances, governed by federal law. Similarly, USPS's Guide to Privacy explains that the Privacy Act provides the governing framework for disclosure and restricts the release of personal information to specifically defined circumstances.

The notices and Guide to Privacy thus reiterate USPS's obligations under the Privacy Act to keep employee information confidential and to publish any limited exceptions under which information may be disclosed. They specifically reference USPS's routine use exception for disclosure to labor organizations, which provides, "As required by applicable law, records may be furnished to a labor organization when needed by that organization to perform its duties . . . ." 70 Fed. Reg. at 22,521.

This language does not require automatic disclosure of sensitive employee information to unions any more than the NLRA requires such disclosure. The Supreme Court has established that

the NLRA does not require automatic, unconditional release of personally sensitive information in all instances. Detroit Edison, 440 U.S. at 319-20. USPS's routine use exception for labor organizations, accordingly, does not mandate unconditional disclosure in every instance.

Several circuit courts of appeal that have addressed this question have concluded likewise that USPS's routine use exception for disclosure to labor organization permits disclosure of relevant information, but does not mandate such disclosure unconditionally where there is a strong competing interest in privacy. See NLRB v. U.S. Postal Serv., 17 F.3d 1434, 1994 WL 47743, at *3 (4th Cir. 1994) (unpublished) ("A bargaining agent does not have an unfettered right to all information relevant to the performance of its duties. . . . An employer may legitimately refuse to furnish relevant information, such as psychological test results, if it has a well-founded concern for employee privacy that outweighs a union's need for the information." (citing Detroit Edison, 440 U.S. at 314-15, 317-20)); NLRB v. U.S. Postal Serv., 888 F.2d 1568, 1572 & nn.3-4 (11th Cir. 1989) (noting that certain types of employee information "need not be disclosed, even though relevant" to a union, such as "psychological test results" (citing Detroit Edison, 440 U.S. at 318)); see also U.S. Postal Serv., 301 N.L.R.B. 709, 709 & n.2 (1991), enforced, 980 F.2d 724 (3rd Cir. 1992) ("[D]isclosure of information relevant to the Union's proper

performance of its duties as collective-bargaining representative of unit employees is permitted, rather than mandated, by the Privacy Act.").

Thus, the fact that information may be disclosed "as required by law" does not itself defeat all expectations of privacy, nor does it create an expectation that the information will be disclosed automatically whenever it is relevant to a union.

The Board's determination that the privacy notices eliminated the employees' expectations of privacy misinterprets both the notices and the law. The notices functioned to reiterate USPS's obligations under federal law to keep confidential its employees' personal information save for specific, well-defined exceptions. The exception for disclosure to labor organizations under the NLRA does not provide for unlimited disclosure, and so could not eliminate all expectations of confidentiality in employee test results.

The Supreme Court's analysis in Detroit Edison applies to this case. Here, USPS psychologist Martha Elizabeth Hennen testified that "[t]he research literature in the field of industrial organizational psychology and psychology in general does find that test results . . . relating to cognitive abilities are considered sensitive to . . . examinees." This is due, at least in part, to the "implications that can be drawn from the . . . test results . . . which are indicative of an examinee's basic or core

competence." The interest of the USPS employees in the confidentiality of their aptitude test scores is as great as the interest of Detroit Edison's employees. The Board erred in finding that the employees had "no legitimate expectation that their test results would remain confidential" and in subsequently declining to engage in the balancing of interests analysis required by Detroit Edison.

We hold that the employees had a sufficient confidentiality interest in their test scores here as to require the Board to engage in a balancing of interests analysis, under Detroit Edison, weighing the interests of the Union in the information against the privacy interests of the employees.

Accordingly, we deny the Board's petition for enforcement and remand for further proceedings consistent with this opinion.

It is so ordered. No costs are awarded.

24-CA-10805

United States Court of Appeals
For the First Circuit

No. 11-1225

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

U.S. POSTAL SERVICE

Respondent

MANDATE

Entered: December 19, 2011

In accordance with the judgment of October 27, 2011, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court.

By the Court:

/s/ Margaret Carter, Clerk

cc:
David Clifford Belt
Stephan James Boardman
Peter D. DeChiara
Usha Dheenan
Linda J. Dreeben
Marta M. Figueroa
Anne M. Gallaudet
Peter Justin Henry
Nicole Lancia
National Labor Relations Board
Leslie Rowe
U.S. Postal Service

Notice will be electronically mailed to:

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Dheenan, Usha
Dreeben, Linda J.
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Breiteneicher, Hank S.

From: Nieves, Sigfredo G.
Sent: Friday, October 28, 2011 4:05 PM
To: Acosta, Jose A.
Subject: FW: United States Postal Service, 24-CA-10805 (356 NLRB No. 75)

Jose add this to NexGen file

-----Original Message-----
From: Habenstreit, David
Sent: Friday, October 28, 2011 1:52 PM
To: Abruzzo, Jennifer; Becker, Craig; Colwell, John F.; Cowen, William B.; Farrell, Ellen; Ferguson, John H.; Flynn, Terence F.; Giannasi, Robert (ALJ); Hayes, Brian; HELTZER, LES (Hdqs); Hirozawa, Kent; Kane, Robert F.; Krafts, Andrew J.; Lennie, Rachel G.; Lieber, Margery E.; Martin, David P.; Mattina, Celeste J.; ML-HQ-Appellate and Supreme Court Litigation Brch; Murphy, James R.; Nixon, Kathleen; Pearce, Mark G.; Solomon, Lafe E.; Winkler, Peter D.
Cc: Figueroa, Marta; Rivera-Vega, Efrain; Padilla, Luis; Nieves, Sigfredo G.
Subject: United States Postal Service, 24-CA-10805 (356 NLRB No. 75)

In a published opinion that issued on October 27, the First Circuit granted the U.S. Postal Service's petition for review and remanded the case to the Board for further proceedings consistent with its opinion.

The Board found that USPS unlawfully failed to provide the Union with employees' hiring register data, including test scores, veterans' preferences, and final rankings. The Union requested the information to assess complaints that veterans' seniority was unfairly low because non-veterans who had applied later were hired ahead of the veterans. The relevance of the information was undisputed. The Board rejected USPS's confidentiality defense, which relied on the Supreme Court's Detroit Edison decision. That decision held that the Act did not require the disclosure of employees' psychological aptitude tests scores. In balancing the competing interests of the employees and union, the Supreme Court considered: the employees' interest in confidentiality, the burden placed upon the union from disclosure conditioned upon employee consent, and whether the employer cited privacy as a pretext to avoid its duty to provide the information. The Board here distinguished Detroit Edison because, rather than the express promises of confidentiality made by that employer, USPS provided disclaimers stating that applicants' information could be disclosed as required by law including release to unions.

The First Circuit, on de novo review of the Board's interpretation of Supreme Court law, concluded that the Board should have engaged in the balancing test used in Detroit Edison. The Court rejected the Board's view of USPS's disclaimers; it found that those statements, made under the Privacy Act, "did not wipe out all expectations of privacy." It concluded that the fact that the information may be disclosed "does not create an expectation that the information will be disclosed automatically whenever it is relevant to a union." The Court remanded because it found that the employees had a sufficient confidentiality interest to require the Board "to engage in the balancing of interests [under Detroit Edison] omitted from its original analysis."

Thanks to Supervisory Attorney Usha Dheenan, who worked on the case with attorney Nicole Lancia, for preparing this summary of the Court's decision.

The Court's opinion is here <http://www.cal.uscourts.gov/cgi-bin/getopn.pl?OPINION=11-1225P.01A> and the Board's brief is here <http://mynlrb.nlrb.gov/link/document.aspx/09031d4580519b1e> .